IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U. S.
FILED
MAR 25 1978
MICHAEL RODAK, JR., CLERK

_____ Term, 1978

No. 77-1362.

Ve-Ri-Tas, Inc. and Pat Walker's of Colorado, Inc.,

Petitioners,

v.

Advertising Review Council of Metropolitan Denver, Inc.; Rocky Mountain Better Business Bureau, Inc.; Advertising Club of Denver; W. Dan Bell; William L. Cook; Jerry Gart; Willa Brown; Robert E. Jordan; Galen E. Broyles; Marilyn Massey; Gordon R. Yates; Albert Fay Hill; Celestino G. Mendez; Jean Larson; Roy L. Jansen; Don Puffer and George Truesdell,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Jurisdictional Statement

Petitioners, Ve-Ri-Tas, Inc. and Pat Walker's of Colorado, Inc., respectfully pray that a Writ of Certiorari

be issued to review the Judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered December 28, 1977 1977, affirming the decision of the Federal District Court for the District of Colorado's dismissal of petitioners' Complaint for damages and injunctive relief.

Opinions Below

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 567 F.2d 963
and is attached hereto as Appendix "A". The Order of the Federal District Court for the District of Colorado dismissing petitioners' Complaint is reported at 411 F. Supp. 1012,
was entered on April 7, 1976,
and appears here as Appendix "B".

Jurisdiction

The date of the judgment sought to be reviewed is December 28, 1977
The jurisdiction of this Court is invoked

under 28 U.S.C. §1254(1).

Questions Presented

1. Where the defendant organizations and governmental agencies systematically exchange information, and refer matters concerning deceptive advertising, to each other, and where, by reason of this continuing practice between the defendants and governmental agencies, the defendants have the obvious ability to trigger official responses to defendants' complaints, have defendants acted under color of "state action" and in violation of 42 U.S.C. §1983, where defendants utilized their unique relationship with governmental agencies to threaten advertisers such as plaintiffs with criminal prosecution unless advertisers such as plaintiffs (1) agree to submit themselves to the jurisdiction of defendants' self-appointed advertising review panels and (2) agree to abide fully with any decision of such panels, regardless of whether or not the panel's

hearings comport with basic and fundamental due process?

2. Where defendants have established advertising review panels designed to coerce nonmembers of defendants' organizations to comply with defendants' subjective and unbridled determinations of "truthfulness" and "ethics", and where such panels were established for the express purpose of obviating the necessity of governmental regulation of advertising practices, are defendants exercising a "public function" thereby acting under color of "state action" in violation of 42 U.S.C. §1983, when defendants use potent threats of criminal prosecution unless advertisers such as plaintiffs (1) agree to submit themselves to the jurisdiction of defendants' self-appointed advertising review panels and (2) agree to abide fully with any decision of such panels, regardless of whether or not the panel's hearings comport with basic and fundamental due process?

3. Where defendants act under color of "state action" to coerce advertisers such as plaintiffs (1) to agree to submit themselves to the jurisdiction of the defendants' self-appointed advertising review panels and (2) to agree to abide fully with any decision of such panels, regardless of whether or not the panel's hearings comport with basic and fundamental due process, have defendants deprived plaintiffs and other advertisers of their rights, privileges, or immunities secured by the First Amendment, Fifth Amendment, and Fourteenth Amendment to the United States Constitution?

4. Where defendants, consisting of, among others, a trade organization many of whose members are in direct competition with plaintiffs, combine to establish procedures whereby only nonmembers of defendants' organizations will be publicly disgraced and humiliated by defendants' press releases and only nonmembers of defendants' organizations will be

recommended for criminal prosecution to the governmental agencies with whom defendants have a close and symbiotic relationship, have defendants committed a per se violation of Section 1 of the Sherman Act, 15 U.S.C. §1, as plainly prohibited by the Supreme Court in Fashion Originators' Guild of America v. Federal Trade Commission, 312 U.S. 457, 61 S.Ct. 703 (1941)?

5. Where defendants, consisting of, among others,a trade organization many of whose members are in direct competition with plaintiffs, combine to establish procedures whereby only nonmembers of defendants' organizations will be publicly disgraced and humuliated by defendants' press releases and only nonmembers of defendants' organizations will be recommended for criminal prosecution to the governmental agencies with whom defendants have a close and symbiotic relationship, have defendants committed a violation of Section 1 of the Sherman Act, 15 U.S.C. §1, under the "rule

of reason"?

6. Where defendants, consisting of, among others, a trade organization many of whose members are in direct competition with plaintiffs, combine to establish procedures whereby only nonmembers of defendants' organizations will be publicly disgraced and humuliated by defendants' press released and only nonmembers of defendants' organization will be recommended for criminal prosecution to the governmental agencies with whom defendants have a close and symbiotic relationship, have defendants committed a violation of Section 2 of the Sherman Act, 15 U.S.C. §2 by combining with other person or persons to monopolize any part of trade or commerce among the several states?

7. Where defendants' activities erect a provincial and local barrier to the dissemination of interstate media advertising through the application by defendants

of vague, overbroad and ambiguous advertising "standards" to advertising appearing in Denver, Colorado, have defendants unduly burdened, interfered with and impeded the free flow of interstate commerce in violation of Article I, Section 8, Clause 3 of the United States Constitution?

Constitutional and Statutory Provisions Involved

This case involves the following constitutional provisions:

First Amendment

"Congress shall make no law . . . abridging the freedom of speech . . .; or the right of the people peaceably to assemble, . . ."

Fifth Amendment

"No person . . . shall . . . be deprived of life, liberty or property, without due process of law; . . ."

Fourteenth Amendment

"No State. . . shall . . . deprive any person of life, liberty, or

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, §8, Clause 3

"The Congress shall have power . . . to regulate commerce . . . among the several States . . ."

This case involves the following statutory provisions:

42 U.S.C. §1983

"Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

28 U.S.C. §1343(3) and (4)

"The district courts have original jurisdiction in any civil action authorized by law to be commenced by any person: . . . (3) To redress the deprivation under color of any State law, statute, ordinance, regulation, custom or usage, of any right, provilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

15 U.S.C. §1

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal."

15 U.S.C. §2

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . .."

15 U.S.C. §15

"That any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Statement of the Case

This Petition seeks review of the decision of the United States Court

of Appeals for the Tenth Circuit which affirmed the decision below of the District Court for the District of Colorado, granting summary judgment to defendants on each of plaintiffs' causes of action.

1. Identification of The Parties. Petitioner Ve-Ri-Tas, Inc. (hereinafter referred to as "Ve-Ri-Tas") was and is at all times relevant hereto a California corporation doing business under the fictitious firm and style name of Pat Walker's International Figure Perfection Salons. Petitioner Pat Walker's of Colorado, Inc. (hereinafter referred to as "Pat Walker's) is and was at all times relevant hereto a Colorado corporation, which did business in Englewood, Colorado, operating a figure perfection salon until late 1974.

Defendants Rocky Mountain Better Business Bureau, Inc., Advertising Review Council of Metropolitan Denver, Inc. and Advertising Club of Denver

(hereinafter referred to as "RMBBB", "ARC", and "Ad Club", respectively) are and at all times relevant hereto were Colorado nonprofit corporations with substantially overlapping memberships. Defendant Bell was General Manager and a director of RMBBB, and a director of ARC. Defendant Cook was President and a director of ARC and a business member of RMBBB. Defendant Gart was Vice-President and a director of ARC, and a business member of RMBBB. Defendant Brown was the Secretary and a director of ARC, and the Executive Director of Ad Club. Brown also participated in the affairs of RMBBB as the representative of Ad Club, a member of RMBBB. Defendant Jordan was Treasurer and a director of ARC and a business member of RMBBB. Defendant Broyles was a director of ARC and a member of Ad Club. Defendants Massey and Yates were directors of ARC and members of Ad Club. In addition, Massey and Yates participated in the affairs of RMBBB as

representatives of May D & F Company and Tallant/Yates Advertising, respectively. Defendant Hill was a director of RMBBB and Chairman of the Advertising Review Board of Metropolitan Denver (hereinafter referred as "ARB"), a subsidiary organization created and maintained by ARC.

As Chairman of ARB, defendant Hill supervised the activities of approximately 30 individuals, who, under guidelines created by the National Council of Better Business Bureaus ("CBBB"), conducted "hearings" in panels of five persons each to determine whether advertising of certain businesses suspected of false advertising by the RMBBB violated the RMBBB's Code of Advertising.

Defendants Mendez, Larson, Jansen, Puffer and Truesdell were the five members of the ARB panel assigned to conduct a "hearing" on the RMBBB charges against petitioners' advertising. Mendez, Larson, Jansen, and Truesdell were

members of RMBBB at the time they served on the ARB panel conducting the "hearing" on petitioners' advertising.

RMBBB's membership includes 800 of the most prominent business enterprises in metropolitan Denver, including, three of Denver's four television stations, the Denver Post and the Rocky Mountain News, radio stations, the Ad Club, major advertising agencies, Denver Banks, insurance companies, leading retailers and manufacturers, businesses and enterprises in health related fields, including doctors, and retailers of sporting goods, exercise and weight loss equipment, in competition with petitioners.

2. RMBBB's Relationship With State and Federal Agencies. For many years, there has existed an ongoing interchange of information and cross references of particular complaints by and between RMBBB and the offices of the Colorado Attorney General and the Denver District

Attorney. In fact, the record demonstrates that RMBBB was an informal screening service for the Colorado Attorney General and the Denver District Attorney. A 1974 survey, conducted by the University of Denver College of Business Administration, demonstrated that Denver area adults believed the RMBBB was an official arm of the government. One RMBBB employee testified that consumers calling the RMBBB "have the idea that the Bureau is funded through the government somehow". As an index of the Denver public's belief that the RMBBB was an official government agency, in 1973 alone, Denver consumers brought 19,1975 complaints against Denver area businesses to the RMBBB, and not to governmental agencies, for resolution. This compares with 7,200 complaints filed by Denver consumers in the year 1974-1975 with the Metropolitan Denver District Attorney's Office.

A congressional study of Better Business Bureaus around the country demonstrated that most consumers go only to Better Business Bureaus and do not further pursue available legal remedies. That congressional study also reported consumers' belief that their local bureaus were arms of government agencies.

The record reflects that RMBBB systematically prepares and delivers on request to governmental enforcement officials all information it has gathered from its investigation of complaints against nonmember businesses. RMBBB receives and uses in its investigations and publications published and unpublished information it has obtained from local state and federal law enforcement officials with whom the RMBBB has a special relationship. At the specific request of State law enforcement officials, RMBBB has conducted"shoppings" of nonmember businesses using RMBBB funds and personnel for such investigations.

The Denver District Attorney's Office refers to RMBBB consumer complaints against businesses for alleged deceptive advertising and business practices, where the Denver District Attorney is unable, because of limited personnel, to handle such matters.

For many years, RMBBB has issued numerous press releases which have been published verbatim or in substance by local media, in which RMBBB publicizes its investigatory work for government, using language which infers to the public that the RMBBB can actually control governmental agencies and can actually cause governmental agencies to prosecute specific cases. Examples of such claims follow:

"Mediterranean Galleries . . . was finally stopped [from allegedly misrepresenting a 'sale'] after BBB presented a strong protest to District Attorney Tooley."

"At the request of the Colorado Attorney General's Office of Consumer

Affairs, all evidence obtained by BBB in its shoppings [of Colorado Electronics Company] has been placed with that office."

"BBB files gave an assist to SEC in its action against David Eugene Duncan . . . recently convicted of criminal contempt for violating a court injunction . . . ."

"BBB investigation led to conviction and penitentiary sentences for . . . FHA violations."

"BBB investigation and information given to Federal Trade Commission in 1970 led to issuance of Cease and Desist Order against . . . ."

"Thirty one business firms in the Denver area have been warned by the Better Business Bureau that any future complaints [RMBBB] receives on any of the companies will be referred to a government agency for appropriate action. . . . W. Dan Bell, Bureau President, said that business firms who establish a pattern of

no response to consumer grievances or who consistently give 'mickey mouse' replies will be turned in to the Federal Trade Commission, State Attorney General or other governmental agency without waiting for the two-week period normally given to the companies to reply. BBB will actively assist in prosecution of such firms in any way that it can, he said."

3. Formation of ARC and ARB. Following guidelines suggested by the national CBBB, the RMBBB and Ad Club created ARC in February, 1974. A "kick-off"news conference, widely reported by Denver media, was attended by the Colorado Attorney General, the Denver District Attorney, the Colorado Secretary of State and the Director of the Metropolitan District Attorney's Consumer Affairs Office, all of whom gave public recognition, praise and verbal support to the formation of ARC.

In accordance with the national CBBB's guidelines, the ABC board of directors selected 32 individuals, most of whom were individuals belonging to RMBBB and/or Ad Club, to constitute a "pool" from which panels of five would be drawn by the ARB Chairman to hear cases against advertisers brought to the ARB by the RMBBB. The purpose of the RMBBB in placing cases before the ARB was to utilize the ARB process to gain additional "leverage" against noncomplying non-member companies.

4. After Formation of ARC and ARB. Following the formation of ARC and its subsidiary ARB panels, the RMBBB activities underwent a subtle but important change. As before RMBBB received complaints from the public and complaints referred to it from the office of the Colorado Attorney General and the Denver District Attorney. If the business complained against was an RMBBB member, the member could be expelled unless it complied with the

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RMBBB demands.

However, if the offender was a nonmember of the RMBBB, instead of its practice prior to the establishment of ARC and ARB of referring unresolved complaints against nonmember businesses to government officials, the RMBBB instead would present the unresolved complaint to one of the ARB panels. The referral to the ARB panels of unresolved complaints against nonmember businesses was accompanied by letters to the nonconforming businesses announcing the referral in a manner obviously intended to imply the proceedings were governmental or official in nature. The letter to the subject advertisers of referral, written on the imposing letterhead of the "Advertising Review Council of Metropolitan Denver, Inc." stated in part that:

"The mandate of the Advertising Review Board calls for making public the decision of its panel and all documents and data relevant to that position. The

Chairman of the Advertising Review Board is also to inform appropriate local and State government agencies of its decision."

Prior to commencement by your petitioners of their action in the District Court, RMBBB presented eight cases to the ARB, including petitioners', as "examples of cases the ARB panels would consider". Four of the cases involved businesses whose advertisements defendants Bell (Manager of RMBBB) and/or Hill (Chairman of ARB) personally believed to be false; misleading and inaccurate. These four cases, including petitioners', were not submitted at or prior to that time to government officials, even though Hill and/or Bell believed that the advertising might be unlawful.

5. <u>The Pat Walker's "Hearing"</u>. Other advertisers receiving the RMBBB notice of referral described above immediatly acquiesced to the RMBBB demands, even

though such advertisers believed that their commercial speech had been entirely proper and truthful. (National companies, faced with similar threats from the National ARB -- sponsored by the CBBB--that they will be publicly exposed and that National ARB's investigative files will be turned over to government agencies have similarly withdrawn advertising which the companies believed to be entirely truthful and proper). RMBBB documents were not turned over to government officials where the advertisers acquiesced to the RMBBB demands prior to the ARB panel hearing.

Upon receiving the ARB notice of referral, petitioners requested notice of the ARB procedures and of the RMBBB complaints. Counsel for petitioners attempted to explain to defendants the numerous constitutional imperfections of defendants' procedures. In reply, defendants insisted that their procedures were intended to accomplish an objective "so that

additional state and federal laws would not be required". Unsatisfied that due process could or would be accorded if petitioners submitted to the ARB panel hearing, petitioners refused to attend the panel hearing. The ARB panel announced their adverse findings to petitioners by letter, dated June 20, 1974. Thereafter, by letter dated July 16, 1974. defendants notified petitioners of their intention to make ARB's decision public and to make the records available to local or state agencies. This action was filed in July, 1974. The District Court refused to enjoin defendants' news release, and, on September 12, 1974, defendants announced to the media that "the Better Business Bureau found the Pat Walker people to be guilty of misleading advertisements." Defendants wrote the District Attorney's Office, enclosed a copy of the panel findings, and announced the availability of RMBBB files for government inspection. Thereafter, and for the

first time, an agent of the State of Colorado Metropolitan Denver District Attorney's Consumer Affairs Office requested and obtained the RMBBB file on petitioners. In early October, the District Attorney not having filed criminal charges against petitioners, defendant Hill wrote a "scalding letter" to the District Attorney, the substance of which was "why haven't you [the D.A.'s Office] filed on Pat Walker's." On October 11, 1974, the Denver District Attorney filed two misdemeanor counts of false and misleading statements against Pat Walker's, challenging the advertising claims which had been contested by the RMBBB in its presentation to the ARB. The documents relied upon by the District Attorney were almost exclusively those documents furnished by the RMBBB to the District Attorney's Office after the ARB announced their availability to the District Attorney. The list of witnesses supplied by the District Attorney were almost exclusively defendants

and their employees.

6. ARB "Due Process". (a) Contrary to their own written procedures, RMBBB presented evidence against petitioners at an ARB panel hearing without giving prior notice of such hearing to petitioners. (b) Contrary to ARB procedures, no transcript of oral testimony of witnesses before the ARB panel hearings was maintained by defendants. (c) By defendants' own standards, petitioners were given inadequate notice prior to the ARB panel hearings of the advertisements to be challenged by the RMBBB before the panel. (d) Four of the five ARB panelists were members of the RMBBB, despite the ARB guidelines that the panels were to be autonomous and independent of any and all other persons and organizations including sponsoring groups. (e) Defendants were uncertain whether ARB panelists had been present at both of the panel meetings at which RMBBB presentations against

petitioners were made. (f) Petitioners were first apprised of the standards which the ARB panel would apply in judging their advertisements three days after the panel hearing when the standards were enclosed with defendants' letter announcing the ARB panel's adverse ruling. (g) According to the District Court, the amorphous advertising standards applied by the ARB panel would violate the First Amendment, if they had been enforceable under color of "state action." (h) Contrary to ARB published guidelines, RMBBB failed to present either petitioners or the ARB panel with significant exculpatory evidence in the possession of RMBBB, including physicians' recommendations of petitioners' weight loss program; a physicians' corroborating report; and unbiased and voluntary customer testimonials. (i) Defendants failed to inform petitioners that, under their own guidelines, the

local ARB lacked "jurisdiction" over the advertisements, since they were defined as "national" advertising to be referred to the national ARB. (j) As evidence against petitioners, RMBBB presented the ARB panel with an Illinois consent decree against a totally unrelated company and involving a totally unrelated weight loss program.

Reasons Why The Writ Should Be Granted

I

THE DECISIONS OF THE DISTRICT COURT AND THE COURT OF APPEALS MISAPPLY AND CONFLICT WITH THE "STATE ACTION" TESTS ESTABLISHED BY THE SUPREME COURT AND HAVE SO FAR DEPARTED FROM THE PROPER APPLICATION OF SUCH TESTS AS TO REQUIRE THE SUPREME COURT'S SUPERVISION.

A. The decisions of the District Court and the Court of Appeals misapply

and ignore the "symbiotic relationship" state action test established by the Supreme Court in Gilmore v. City of Mortgomery, 417 U.S. 556, United States v. Price, 383 U.S. 787, Burton v. Wilmington Parking Authority, 365 U.S. 715, and the line of cases derived therefrom.

State involvement in private conduct is frequently "nonobvious" and requires the sifting of facts and weighing of circumstances. Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961) (Clark J.). The facts and circumstances of this case revealed: (1) The ongoing exchange of information and cross-referral of consumer complaints by and between RMBBB and State governmental agencies; (2) The use by State governmental agencies of the RMBBB to conduct investigations for State governmental agencies, to screen consumer complaints for State governmental agencies and to supply State governmental agencies, with documentation and court witnesses

necessary to prosecute businesses who are nonmembers of RMBBB; (4) The public endorsement in February, 1974, by the State governmental agencies at a press conference, of the RMBBB and Ad Club's establishment of the ARC and ARB, which were in future to conduct hearings on cases brought to their attention by the RMBBB against nonmembers suspected of "deceptive" or "unethical" advertising practices; (5) After the establishment of the ARB and ARC by the RMBBB, nonmembers of RMBBB who were suspected of deceptive advertising practices would no longer be directly and immediately referred to the appropriate State governmental agencies, but instead, would receive threatening letters that ARB panels would hear their cases and, if found "guilty" by the ARB panels, that the advertisers would be publicly discredited in a press release and then (and only then) would the RMBBB files be made available to State governmental

officials for prosecution.

The District Court, in reviewing the above facts and circumstances, felt that the defendants were doing no more than commendable "self-regulation". The Court of Appeals took a more critical view of defendants' "self-regulation", since it was clear that the parties regulated by defendants were nonmembers exclusively. However, both the District Court and the Court of Appeals failed to recognize and accord its significance the extent to which State governmental agencies had become accomplices with and, in fact, the very backbone of the defendants' "self-regulation" procedures.

The Bureau had, for many years, deliberately advertised to the public its close relationship with State governmental agencies. The public believed that the RMBBB was in fact an arm of the government. The widely publicized endorsement of the State governmental agencies for the

defendants' ARC would only have augmented public belief that defendants were governmental. In endorsing the ARC plan, State governmental agencies knew or should have known that the "power source" behind the ARC and ARB proceedings would be the express threat to subjected businesses of RMBBB cooperation with government prosecution, in the event the businesses did not cooperate; and the implied promise, if such businesses did cooperate, that RMBBB files would be withheld from government agencies. The resolution of other ARB panel cases demonstrated the impact of those express and implied promises. The threat of reference to a public agency had, in the Court of Appeals' opinion, "the obvious ability to trigger some official response." As the Court of Appeals stated, "the record clearly shows that the [RMBBB] used its ability to cause some official reaction by its reference to the District Attorney."

The "nonobvious" but symbiotic relationship between the defendants' procedures and the State governmental agencies required a finding of "state action" in this case. Defendants derived their entire coercive powers from that precise symbiotic relationship with the government agencies. The cases of the Supreme Court clearly demonstrate that the participation of government agencies in private action need not be "deliberate" or "intentional". Even so, the facts in this case demonstrate the positive support of the State governmental agencies for the defendants' proposed procedures which relied upon the "clout" which the defendants' unique and special relationship with the governmental agencies could afford to them. The District Court and Court of Appeals misapplied and ignored the "symbiotic relationship" state action test laid out by this Court in the above-referenced cases, and improperly dismissed

petitioners' cause of action.

B. The District Court and Court of Appeals misapplied and ignored the Supreme Court's "public function" state action test as established by this Court in Marsh v. Alabama, 326 U.S. 501 (1946), and Hudgens v. NLRB, 424 U.S. 507 (1976).

Defendants believed that the advertising of petitioners, as well as the advertising of three other businesses, were untrue, deceptive, and misleading, and thus violative of Colorado state law. Instead of performing their duty as citizens to report potential violations of law, defendants referred the matter to their own vigilante ARB panel for decision. Reviewing the District Court, the Court of Appeals stated that "the facts show the activities and the relationships to closely approach the public function line, but do not cross it." The Court of Appeals failed to accord proper significance to the fact that defendants

self-admittedly were attempting to establish procedures to prevent the necessity of formal governmental action. Prior to the establishment of the ARC and ARB, unresolved RMBBB complaints against subject businesses were referred to the appropriate governmental agencies, where they became matters for official government action. After the establishment of the ARC and ARB, unresolved RMBBB complaints against nonmembers were not to be referred to government agencies, but were to be referred to the ARC and ARB for resolution through the coercive application of threats of governmental action. This revised procedure received the public endorsement of government agencies. The rationale of the "public function" doctrine applies with great vigor to the facts of this case:

"Private persons who possess power to significantly deprive a general community of rights protected by the Constitution against state infringement possess powers

equivalent to those of government. Such private persons and those exercising certain peculiarly governmental functions threaten these rights as effectively as government itself." "State Action: Theories for applying Constitutional Restrictions to Private Activity," 74 Col. L.Rev. 656, at 691 (1974).

Defendants understood themselves as undertaking a governmental role, in order to prevent official agencies from increasing their own enforcement activities. Unfortunately, defendants, in their rush to usurp governmental functions, trampled over the procedural and substantive due process rights of the nonconsenting businesses over which defendants asserted their self-righteous authority.

In 1926, a Massachusetts District Court was faced with facts similar to those involved herein. In American Mercury, Inc. v. Chase, 13 F.2d 224 (D. Mass. 1926),

an unofficial society organized by defendant Chase scrutinized publications to determine whether the books and magazines violated the law. If, in the society's opinion, the publication was unlawful, distributors were notified of the society's opinion "with the intimation, express or implied, that if the book or magazine be sold or distributed prosecution will follow. Where this warning is ignored, it is [the society's] custom to institute prosecutions." American Mercury, Id., at p.224. The Court enjoined the society with the following language:

"In my judgment, this is clearly illegal. The defendants have the right of every citizen to come to the courts with complaints of crime; but they have no right to impose their opinions on the book and magazine trade by threats of prosecution if their views are not accepted. [citations omitted]. The fact that the defendants are actuated by no commercial

motive and by no desire to injure the plaintiff do not enlarge their rights in this respect . . . .

"Of course, the distributors have the right to take advice as to whether publications which they sell violate the law, and to act on such advice, if they believe it to be sound. The defendants have the right to express their views as to the propriety or legality of a publication. But the defendants have not the right to enforce their views by organized threats, either open or covert, to the distributing trade to prosecute persons who disagree with them." American Mercury, Id. at p.225.

Under the facts and circumstances of this case, defendants have most clearly exercised a "public function" and have thereby deprived petitioners of First Amendment rights of commercial speech, freedom of disassociation, and substantive and procedural due process.

II

THE DISTRICT COURT IMPROPERLY HELD THAT DEFENDANTS' ACTIVITIES, CONDUCTED UNDER "STATE ACTION", DID NOT INFRINGE PETITIONERS' CONSTITUTIONAL RIGHTS.

In what appears as dictum in the District Court's opinion, and unreviewed by the Court of Appeals, the District Court stated that defendants had not infringed petitioners' constitutional rights. However, the District Court itself stated that the amorphous standards applied by the ARB panel to petitioners' advertising would be held violative of the First Amendment, by reason of vagueness, if they had been enforceable under "state action." The District Court apparently concluded that, since, in its view, defendants' activities were not infused with "state action", that any process accorded to petitioners by

defendants would be "due". However, defendants' nonobservance of their own written procedures, and the absence of commonly accorded procedures to which petitioners would be entitled in a criminal prosecution for deceptive advertising, bely the District's ruling.

III

DISTRICT COURT AND COURT OF APPEALS, IN FAILING TO FIND A PER SE VIOLATION OF THE SHERMAN ACT, HAVE DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT, MOST NOTABLY, FASHION ORIGINATORS' GUILD OF AMERICA v, FEDERAL TRADE COMMISSION, 312 U.S. 457 (1941).

The rationale of Fashion Originators' applies decisively to the facts of this case. As here, in Fashion Originators, a trade association set up an elaborate system of trial and appellate tribunals for the purpose of determining whether a nonmember had pirated a member's dress design. Justice Black, in memorable language,criticized the association as;

". . . an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals for determination and punishment of violations, and thus 'trenches upon the power of the national legislature and violates the statute.'" Fashion Originators Guild v. Federal Trade Commission, 312 U.S. 457 at 707.

The association argued that its practices were "reasonable and necessary to protect the manufacturer, laborer, retailer and consumer against the devastating evils growing from the pirating of original designs . . . ." Id. at p.708.

However, Justice Black, speaking for the Court, replied that the reasonableness of the methods pursued by the combination to accomplish its unlawful object was immaterial.

". . . even if copying were an acknowledged tort under the law of every

state, that situation would not justify petitioners in combining together to regulate and restrain interstate commerce in violation of federal law." Id.

Other trade associations whose activities parallel those of the defendants herein have been held to have violated Section 1 of the Sherman Act. American Medical Association v. United States, 317 U.S. 519 (1943); Eastern States Lumber Dealers Asso. v. United States, 234 U.S. 600 (1914); United States v. Parke-Davis & Co., 362 U.S. 29 (1960); American Column & Lumber Co. v. United States, 275 U.S. 377 (1921); Federal Trade Commission v. Beechnut Packing Co., 257 U.S. 441 (1922); Radiant Burners v. People's Gas & Coke, 364 U.S. 656 (1961). See also, "Use of Economic Sanctions by Private Groups: Illegality Under the Sherman Act," 30 U. Chi. L.Rev. 171 at 179.

It is respectfully submitted that the District Court and Court of Appeals

have failed properly to apply the law of the Supreme Court as contained in the above-cited cases.

IV

THE DISTRICT COURT AND COURT OF APPEALS, BY FAILING TO OBSERVE THE SUPREME COURT'S TESTS OF "STATE ACTION", IMPROPERLY RULED THAT DEFENDANTS' ACTIVITIES WERE NOT AN UNDUE BURDEN ON INTERSTATE COMMERCE, IN VIOLATION OF THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

The Court is referred to the argument hereinabove set forth, respecting the "state action" tests which were improperly applied or ignored by the District Court and Court of Appeals.

V

THE DECISIONS OF THE COURT OF APPEALS AND DISTRICT COURT PRESENT A NOVEL CIVIL RIGHTS RULING OF SUBSTANTIAL PUBLIC IMPORTANCE AND GRAVITY WHICH HAS ALREADY RECEIVED NATIONAL ATTENTION AND, IF PERMITTED TO STAND, WILL INVITE FURTHER INCURSIONS BY OSTENSIBLY PRIVATE GROUPS UPON THE DUE PROCESS AND FIRST AMENDMENT RIGHTS OF INTER-STATE BUSINESSES.

Defendants' ARC organization is only one of numerous local Advertising Review Councils established around the country in accordance with guidelines circulated by the Council of Better Business Bureaus ("CBBB"). In addition, the CBBB has, in association with the American Advertising Federation, the American Association of Advertising Agencies, and the Association

of National Advertisers, established a national advertising review council, whose procedures were substantially identical to those of defendants. Petitioners respectfully submit that the conduct and actions of defendants herein constitute a wanton and dangerous overstepping of private conduct into a realm of action which is governmental in nature, and which should be subject to constitutional safeguards and guarantees. Conduct of defendants, and similar groups around the nation, unless checked, will deprive individuals and businesses of free exercise of commercial speech and may counteract the work of this Supreme Court in bringing commercial speech under the protection of the First Amendment.

Conclusion

Petitioners pray that this Petition be granted.

Respectfully submitted,

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A P P E N D I X "A"

Filed
United States Court of
Appeals - Tenth Circuit
December 28, 1977
Howard K. Phillips,
Clerk

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

VE-RI-TAS, INC. and PAT WALKER'S OF COLORADO, INC.,

Appellants,

v.

ADVERTISING REVIEW COUNCIL OF METROPOLITAN DENVER, INC., et al.,

Appellees.

D.C. NO. 74-M-625

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

David S. Koslow, Los Angeles, California (Robert C. Hawley, Denver, Colorado, Harrison W. Hertzberg, Los Angeles, California; Ireland, Stapleton, Pryor & Holmes, Denver, Colorado, and Hertzberg, Kaplan & Koslow, Los Angeles, California, of Counsel, with him on the Brief), for Appellants.

Thomas Kelley, of Yegge, Hall & Evans, Denver, Colorado (John D. Phillips, Jr., Denver, Colorado, with him on the Brief), for Appellees.

Before Seth, Chief Judge, HOLLOWAY and BARRETT, Circuit Judges,

SETH, Chief Judge.

The plaintiffs asserted three separate claims based on violations of the Fourteenth Amendment, the antitrust laws, and in placing a burden on interstate commerce. The facts were fully developed during the course of extensive discovery, and both sides filed motions for summary judgment. The parties agreed that the record was complete. The trial court granted defendants' motion for summary judgment, and the plaintiffs appeal.

The plaintiffs assert that there was color of state law or state action as a consequence of a symbiotic relationship between the defendants and the governmental authorities as described in Gilmore v. City of Montgomery, 417 U.S. 556; United States v. Price, 383, U.S. 787; and Burton v. Wilmington Parking Authority, 365 U.S. 715. The

trial court concluded that defendants' acts were not under color of state law, and that there was no public function by them under 42 U.S.C. §1983.

The trial court found that defendants, the Colorado Attorney General, and the Denver District Attorney were all directing their efforts toward protection of the buying public. The record shows that the official agencies and the defendants were exchanging information, and were referring matters concerning deceptive advertising to each other. All were going in much the same direction, and their areas of interest and activity overlapped. The trial court found, however, that the complaint filed by the District Attorney against Pat Walker's of Colorado, Inc., was the result of the exercise of independent judgment of the prosecutor, and that alone.

The plaintiffs also assert that under Hudgens v. NLRB, 424 U.S. 507, the

defendants were performing a public function. This "public function" issue is a difficult one to resolve. The standards sought to be imposed by the defendants are those of public concern and regulation. As the trial court pointed out, the two functions overlap. The District Attorney refers complaints to the BBB, and it refers matters to the District Attorney, as mentioned above. It is not really "self-regulation." Appellees' brief states that there are some 20,000 businesses in the area and some 815 belong to the BBB. All of the 20,000 probably do not advertise, but the 815 are seeking to regulate primarily nonmembers. It is thus hard to tell who the "self" is.

Probably the most siginificant or revealing aspect of the BBB - District Attorney relationship is the fact that if a nonmember refuses to change the advertisements it has been running or to stop them, the matter is referred to the District Attorney.

This is advanced by the appellees as the exercise of their duty as a citizen, that is to report some misdeed. However, if this same nonmember had agreed to change the advertisements or to stop it in the face of appellees' threat, his misdeed would not be reported to the District Attorney. In each instance, the transgressions are the same, but only if the BBB is unable to accomplish the enforcement it seeks is the matter reported. This reporting or nonreporting takes much of the luster from the image of a "good citizen" reporting a transgression. The appellees in their brief take a similar inconsistent position when they treat the situation where the nonmember abides by the Board decision as a "moral issue," and when the nonmember refuses to agree, it is a matter of fraud.

This lends some credence to the "public function" argument. This is coupled with the threat of reference to a public agency

with the obvious ability to trigger some official response. It would seem to be a sufficient demonstration of its position to bring about some reaction from public law enforcement officials. This need not result in a formal charge. The District Attorney did not use the BBB, but the record clearly shows that the BBB used its ability to cause some official reaction by its reference to the District Attorney. Any good citizen can "demand" that charges be filed as did the letter of Mr. Hill as chairman of the ARB, but this was to demonstrate some clout where the position was not agreed to by the nonmembers. If there had been agreement there would not have been this good citizen letter. This is somewhat akin to selective enforcement.

All in all, we must say however that the facts show the activities and the relationships to closely approach the public function line, but do not cross it. The

evidence is sparse on the use of the BBB, and the related entities, by the law enforcement agencies. They react to submissions by the BBB, but obviously initiate their own investigations and procedures. The BBB clearly does not function as an arm of official enforcement. We thus hold that the test of a public function has not been met. Hudgens v. NLRB, 424 U.S. 507; Marsh v. Alabama, 326 U.S. 501.

We agree with the conclusion of the trial court that the defendants were not acting under color of state law.

We have considered the antitrust issue advanced by the appellants, and we fully agree with the analysis of the antitrust issue as made by the trial court, and nothing would be served by a further discussion in this opinion. There is no basis for the claim by reason of the divergent positions and interests of the various parties.

The other points of appellants have

been considered, but we find no merit in them.

AFFIRMED.

A P P E N D I X "B"

Filed
United States District Court
Denver, Colorado
April 7, 1976
James R. Manspeaker,
Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 74-M-625

VE-RI-TAS, INC. and PAT WALKER'S OF COLORADO, INC.

Plaintiffs,

v.

ADVERTISING REVIEW COUNCIL OF METROPOLITAN DENVER, INC., et al.,

Defendants.

Mr. Harrison W. Hertzberg, 3550 Wilshire Boulevard, Suite 1418, Los Angeles, California 90010, and Ms. Gretchen VanderWerf of Ireland, Stapleton, Pryor & Holmes, P.C. 1700 Broadway, Denver, Colorado 80202, attorneys for the plaintiffs. Mr. John D. Phillips and Mr. Thomas B. Kelley of Yegge, Hall & Evans, 1340 Denver Club Building, Denver, Colorado 80202, attorneys for the defendants.

MEMORANDUM OPINION AND ORDER

MATSCH, Judge

This action was commenced by the filing of a complaint on July 17, 1974. An amended complaint was filed September 30, 1974. The parties engaged in extensive discovery and upon the facts developed, both plaintiffs and defendants have filed cross motions for summary judgment upon which a hearing was held. The issues are now presented for final disposition.

THE PARTIES

VE-RI-TAS, INC. is a California corporation doing business under the fictitious name and style of Pat Walker's Int'l. Figure Perfection Salons. Its principal place of business is in Los Angeles, California and it also has an office in Houston, Texas. The plaintiff Pat Walker's of Colorado, Inc., is a Colorado corporation which did business in Englewood,

Colorado operating a figure perfection salon until October 29, 1974.

Rocky Mountain Better Business Bureau (BBB) is a private, non-profit corporation organized under Colorado law. Its activities are funded by dues from its members, public donations and sales of literature to its members and to the public. BBB received no financial aid or assistance from the State of Colorado and its members include more than 800 business enterprises and approximately 100 consumers.

Advertising Club of Denver (Ad Club) is a non-profit Colorado corporation with members who are advertising agencies and persons engaged in the advertising business.

Advertising Review Council of Metropolitan Denver, Inc., (Ad Council) is a Colorado non-profit corporation which was organized to create and maintain the Advertising Review Board of Metropolitan Denver (ARB). The individual defendants

Bell, Cook, Gart, Brown, Jordan, Broyles, Massey and Yates are all directors of the Ad Council. Defendant Bell is also general manager and a director of BBB.

The defendant Hill is chairman of ARB which consists of thirty members who are available to serve on five member panels for the purpose of considering the truth and accuracy of specific advertising claims. The other individual defendants are the members of the panel concerned with Pat Walker's advertising. The composition of the ARB is to be forty per cent local advertisers, thirty per cent local advertising agencies and thirty per cent local public members and that same relationship is to be maintained on the individual panels.

UNCONTROVERTED FACTS

The essential facts are not in controversy. The business of VE-RI-TAS is the leasing of figure perfection machines

and equipment to salons in several states using a standard equipment rental agreement. These rental agreements and arrangements between VE-RI-TAS and the salons bear some resemblance to franchising agreements. For purposes of this case, it is not necessary to define the exact legal relationship between VE-RI-TAS and such businesses.

Pat Walker's of Colorado, Inc. had rental agreements for the use of fifteen of these weight reduction machines. VE-RI-TAS also assisted the salons, including Pat Walker's of Colorado, Inc., by giving counsel and advice with respect to marketing and advertising. VE-RI-TAS provided advertising slicks for use by the Colorado outlet as well as other salons.

Ad Council was incorporated in February, 1974 and a public announcement of its formation was made at a press conference on April 10, 1974, attended by the Colorado Attorney General, the

Denver District Attorney, the Colorado Secretary of State and the Director of the Metropolitan District Attorney's Consumer Affairs Office. These officials gave public recognition, praise and verbal support to what they described as an effort at self regulation by the business community.

The stated purpose of the ARB was the achievement of the highest standards of truth and accuracy in advertising through a system of self regulation.

BBB received complaints from the public. The staff of the office of the Colorado Attorney General and the Denver District Attorney also refer citizen complaints to the BBB. The BBB makes an effort to resolve the complaints by negotiation and agreement with the offending advertiser. If the offender is a BBB member, the sanction of explusion may be used. For purposes of these summary

judgment motions, it is assumed that the plaintiff could prove that in practice BBB members are treated differently from non-members with respect to advertising complaints against them.

On June 4, 1974, ARB chairman Hill wrote a letter to Pat Walker's of Colorado, Inc., to advise of the referral from BBB of a complaint regarding Pat Walker's advertising. In that letter the president of Pat Walker's was invited to appear and present testimony and argument before the panel and notice was given that the decision of the panel would be made public and that it would be given to appropriate local and state government agencies.

Plaintiffs' counsel requested all documents relative to ARB procedures, which were given to him before June 24. On that day, plaintiffs' counsel wrote to chairman Hill, raising procedural due

process objections and denying that ARB had any jurisdiction to consider any complaints against his clients.

On the morning of June 26, Pat Walker's of Colorado, Inc. received written notice of the specific advertising claims being questioned. On the afternoon of that day, plaintiffs' counsel met with chairman Hill to explain further the procedural due process objections to the procedure which ARB was following.

The panel did meet and conduct a hearing on the evening of June 27. There was no appearance for any one representing Pat Walker's of Colorado, Inc. BBB members attended and presented evidence which resulted in the panel determination that Pat Walker's ads violated the BBB Code of Advertising. These violations included the use of a testimonial made by the wife of the president of Pat Walker's, without disclosure of the fact

of that relationship. Claims of the effectiveness of weight reduction through the use of "passive exercise equipment" were also found to be misleading.

The occupations of the panel members in this case are a co lege teacher, a clerk of the Colorado Senate, the president of an appliance store, the director of a credit bureau and an advertising agency representative.

By a letter dated June 30, 1974, chairman Hill advised Pat Walker's of Colorado, Inc. that the panel meeting had been held and the specific charges and findings made were quoted in that letter. Chairman Hill requested that Pat Walker's cease the use of the offending advertising within a reasonable time and he asked to hear from Pat Walker's within ten days "regarding your 'acceptance, rejection or request for modification or reconsideration of the board's decision'".

There was no reply to that letter.

On July 16, defendant Hill wrote another letter to Pat Walker's of Colorado, Inc. to advise of ARB's intention to make the matter public and to make the records available to appropriate local or state agencies. In that letter, he also said that if Pat Walker's submitted a concise statement of its view, that statement would be published and released simultaneously with the ARB release.

As previously noted, this litigation began July 17, 1974 and the plaintiffs moved for a preliminary injunction against any news release. That motion was denied because it would have been a prior restraint of speech.

On September 12, 1974 chairman Hill held a news conference at which he released a statement that the ARB panel found Pat Walker's advertising to be misleading or unethical. He also

submitted this information to the Denver District Attorney and invited his examination of the BBB files.

The Denver District Attorney did file a criminal complaint against Pat Walker's of Colorado, Inc. on October 11, 1974, charging two counts of false and misleading statements in advertising. Such misdemeanors were alleged to have occurred on October 1, 1974 and October 8, 1974. Those charges were never brought to trial.

BBB is a dues paying member of the National Council of Better Business Bureaus. That organization supports and coordinates efforts of local Better Business Bureaus, including participation in the development of advertising review councils.

Upon these facts, the plaintiffs seek an injunction, declaratory relief and money damages under three separate

claims for relief. First, it is claimed that the defendants, acting under color of authority, violated the Fourteenth Amendment by infringing upon the plaintiffs' liberty and property rights without due process of law. Second, it is contended that the defendants violated the federal antitrust laws. Third, it is asserted that the defendants have placed an undue burden on interstate commerce. Jurisdiction to consider these claims is alleged to exist under 42 U.S.C. §1983, 28 U.S.C. §1343(3) and 1343(4), the Fourteenth Amendment, 15 U.S.C. §§15 and 26, and 28 U.S.C. §1337.

The material facts, disclosed by the extensive discovery record to be uncontroverted, show that the plaintiffs are not entitled to relief under any of these claims and that this civil action should be dismissed.

There can be no involvement of the Fourteenth Amendment and no cause of action under 42 U.S.C. §1983 if the defendants did not act under color of state law. It is the abuse of governmental authority which generates the right to relief. Because none of the defendants is an agency or official of government, the plaintiffs rely upon that line of authorities which finds the existence of state action where there is a showing of a symbiotic relationship with government. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), United States v. Price, 383 U.S. 787 (1966), Gilmore v. City of Montgomery, 417 U.S. 556 (1974).

There is no touchstone by which to test the sufficiency of the nexus. The focus of the inquiry is whether the evidence shows that the state has elected to place its power, property and prestige behind the defendants' actions.

Gilmore v. City of Montgomery, supra.

Here the State of Colorado has exercised its police power by proscribing false and misleading statements in advertising with a criminal sanction. 1973 C.R.S. §18-5-301. Both the Colorado Attorney General and the Denver District Attorney assigned staff members to specialize in consumer protection matters. There has been considerable cooperation between those offices and the defendant corporations with an ongoing interchange of information and cross references of particular complaints. Such contribution to and cooperation with law enforcement is an exercise of constructive citizenship and the plaintiffs' briefs recognize the responsibility to relate information about criminal action to the proper governmental authority. The important involvement in this case is the extent to which state authority is the enforcement

mechanism for the standards of ethics and propriety established by the defendants. That, in turn, leads to the question of whether there is any indication of an infringement of constitutionally protected interests.

It is now clear that commercial speech is entitled to First Amendment protection. Bigelow v. Virginia, 421 U.S. 809 (1975). Accordingly, the plaintiffs had a right to advertise their products and services without a prior restraint or threat of governmental retaliation. Thus, if it were shown that the defendants were calling for some conformity with their notions of proper advertising content and that they had a call upon the power of prosecution to threaten criminal charges to enforce those views, there could be a basis for relief. That is not the case.

There is no question but that the BBB code of advertising is a private and

unofficial view of what commercial speech ought to be. There is also no question but that the State of Colorado can sanction false and misleading advertising through the criminal process without violating First Amendment freedoms. There is also a large area of coincidence as to what is criminal and what violates the unofficial code. The particular advertising statements involved in this case would seem to be within that area of coincidence.

There is nothing in this record to suggest that in the filing of the criminal complaint against Pat Walker's of Colorado, Inc. the Denver District Attorney's office acted in any way other than by the exercise of independent judgment that the information available, including that provided by the defendants, indicated the violations charged. There is nothing to show that these complaints were coerced by any of the defendants. It is clear that defendant

Hill and others sought to energize this prosecutive effort by calling attention to Pat Walker's advertising.

To put this case into proper context, recognition must be given to the defendants' freedom of speech. Those who call public attention to themselves or to their products and services through advertising must expect and anticipate that others will take issue with them. If the constitutional protection is to be given to commercial speech, it must be done with the same open exchange as we have long recognized for the free expression of ideas. What is presented in the record in this case is a well organized effort to use the power of publicity and peer group condemnation to establish a standard of responsibility in commercial communication. There is no imbalance of interests presented here. This kind of clash of claim and counterclaim is,

indeed, the engagement of conflicting interests which our constitutional system of ordered liberty is designed to protect. The traditional law of defamation is an adequate inhibition of any excesses attendant upon this type of activity.

The plaintiffs also claim that the color of law requirement is met in this case by a finding that the defendants, most particularly BBB, were performing a function which is public in nature and for which they have a fiduciary responsibility. Marsh v. Alabama, 326 U.S. 501 (1946) is cited as authority. There, the Supreme Court found that a private corporation was in the position of government in the operation of a company town. The rationale of that case has now been greatly restricted by the Supreme Court. Hudgens v. National Labor Relations Board, 44 U.S.L.W. 4281 (March 2, 1976).

There is no substitution of private for public authority in this case. The defendants are seeking to enforce the BBB advertising code. That is not the equivalent of any state statute or local ordinance. Indeed, if the standards set by that code were to be enacted into any law or regulation enforced by governmental action, it would be an infringement of First Amendment freedom. The advertising code can go beyond the limits of governmental action precisely because its enforcement mechanism is nothing more than a call of public attention to the offending conduct.

In summary, I conclude that the evidence reveals that the defendants here were not acting under color of law and, accordingly, there is no basis for relief under 42 U.S.C. §1983 or the Fourteenth Amendment.

Even if a contrary conclusion were

indicated by the evidence, the defendants' actions were consistent with applicable standards of due process. Whether the protected interests of the plaintiffs be considered in terms of the freedom of speech or the property rights involved in their business activities, the limitation of the sanction to adverse publicity could not conceivably call for more protection than that provided here. The criminal charges made against these plaintiffs have not been tried and the record does not disclose any reason for the failure to proceed with prosecution. No criminal sanctions have been imposed. The standard of what process is due for the retaliatory actions of the defendants is not to be confused with that required for criminal prosecution. Here the plaintiffs were given an opportunity to participate in a hearing and they were given an opportunity to participate in the formulation

of a public statement about the findings of the panel. Where, as here, the plaintiffs have made no effort to use the process available to them, they can hardly be claiming to be injured because not more was available.

The second claim for relief is for private enforcement of prohibited anti-trust activities. Under Section 4 of the Clayton Act, there can be private redress for such public wrongs if damage is shown. Here, the plaintiffs contend that there is a per se violation of Section 1 of the Sherman Act and an apparent attempt to monopolize in violation of Section 2 of that Act. More specifically, the plaintiffs contend that these defendants are engaged in a conspiracy among themselves and with the Council of Better Business Bureaus to restrain trade and commerce in the weight loss business within the greater Denver metropolitan area and to exclude

non-members of BBB from those markets. The claimed effect is the destruction of the business of Pat Walker's of Colorado, Inc. and an impairment of the business of VE-RI-TAS. Plaintiffs seek to bring their Section 1 charge within Fashion Originators Guild v. Federal Trade Commission, 312 U.S. 457 (1941) where an association of dress manufacturers sought to combat style piracy by boycotting retailers who sold garments copied by non-guild manufacturers. That was held to be a group boycott which was a per se violation of Section 1 of the Sherman Act.

A comparable kind of violation was found in Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co., 364 U.S. 656 (1961). That involved a refusal to supply gas to consumers upon the basis of an alleged failure to comply with association standards of safety.

The obvious distinction between Fashion Guild, Radiant Burners and the present case is that here there is no refusal to deal and no concerted effort or attempt to boycott or to cause others to refuse to deal with the plaintiffs.

The plaintiffs have called attention to an FTC advisory memorandum refusing requested approval of an advertising review activity of the Better Business Bureau Pulaski County, Little Rock, Arkansas which was somewhat comparable to that involved in this case. The difference provides the distinction because the Pulaski County action involved an effort to persuade all advertising media to refuse to accept the offending material. No such effort is involved in what the defendants did here. If the antitrust laws were to be read so braodly as to preclude fair comment on the content of advertising material, they would infringe

upon the defendants' First Amendment freedom. Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers of America v. Pennington, 381 U.S. 657 (1965).

Nothing in this record suggests any intent to monopolize by excluding the plaintiffs from the Denver market. Indeed, none of the defendants appears to be in competition with the plaintiffs in the weight loss market. It is too much to say that every sporting goods store is in competition with weight reduction salons simply because there is the sale of exercise equipment. While the two Denver metropolitan newspapers are members of BBB, there is nothing in the record to suggest that they acted in any way to inhibit advertising in their papers by the plaintiffs. The fact is that the advertising which was the subject of the criminal complaint was in October, 1974, much after

the June panel hearing and, indeed, after the commencement of this litigation.

The present case is quite comparable with McCann v. New York Stock Exchange, 107 F.2d 908 (2nd Cir. 1939), an action under the antitrust laws in which the plaintiff claimed that the New York Stock Exchange and New York Better Business Bureau had conspired to drive him out of business by publishing letters and leaflets describing him as "unreliable morally and financially, with a criminal record". There Judge Learned Hand said:

> . . .To be actionable the combination or agreement must be unlawful in means, or in end; the only unlawful means possible were the utterances about the plaintiff, the truth of which the judge did leave to the jury. The end avowed - - ridding the business of unscrupulous persons - - was not only lawful, but commendable, and while the defendants may have had other motives, that had to be proved and could not be assumed.
> (page 912)

There is no proof of such other motive in this case. Indeed, in my view the Pat Walker advertising was misleading because of its failure to tell the whole truth. The discovery record supports the characterizations and conclusions made by the defendants.

The third claim for relief fails because there is no jurisdiction in this court to grant private relief under the commerce clause of the Constitution. Clause 3 of Article 1, §8 of the United States Constitution is a limitation upon the power of the state. Prudential Insurance Co. v. Benjamin, 328 U.S. 408 (1946) and Freeman v. Hewit, 329 U.S. 249 (1946). It does not create any implied cause of action and the defendants engaged in private activities, not state action. Cf. Chavez v. Freshpict Foods, Inc. 456 F.2d 890 (10th Cir. 1972); Skidmore v. Travelers Insurance Co., 356 F. Supp. 670

(E.D. La. 1973), aff'd. 483 F.2d 67.

Upon all of the foregoing, it is concluded that the plaintiffs have no claim for relief within the jurisdiction of this court and that a summary judgment should be entered for the defendants with a dismissal of this civil action. It is, therefore,

ORDERED that the complaint, amended complaint, and this civil action are dismissed and that judgment shall enter for the defendants with their costs to be taxed.

Dated at Denver, Colorado, this 7th day of April, 1976.

BY THE COURT:

Richard P. Matsch, Judge
United States District Court

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
)ss.
COUNTY OF LOS ANGELES)

AFFIDAVIT OF SERVICE BY

MAIL BY ATTORNEY

I, HARRISON W. HERTZBERG, ESQ. being first duly sworn, depose and state:

That I am and was at all times herein mentioned a citizen of the United States, employed in the County aforesaid, and over the age of 18 years; I further say that I am an active member of the State Bar of California, admitted to practice before the Supreme Court of the United States of California, a member of Hertzberg, Kaplan & Koslow, attorneys of record in this case, and am not a party thereto.

My business address is 3550 Wilshire Boulevard, Suite 1418, Los Angeles, California 90010.

That on March 24, 1978, I served the within PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Tenth Circuit on the interested parties in said action by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid, in the United States mail at 3550 Wilshire Boulevard, Los Angeles, California, 90010, addressed as follows:

John D. Phillips
YEGGE, HALL & EVANS
1340 Denver Club Bldg.
Denver, Colorado 80202

CLERK, UNITED STATES COURT
OF APPEALS - TENTH CIRCUIT
469 United States Courthouse
Denver, Colorado 80202

CLERK, UNITED STATES DISTRICT
COURT, DISTRICT OF COLORADO
United States Courthouse
Denver, Colorado 80202

HARRISON W. HERTZBERG

Subscribed and sworn to before
me this 24th day of March, 1978.

Mina Quezada

Notary Public in and for Said
County and State